**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **STATE OF WASHINGTON,** | ) | **No. 28364-0-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **BRYAN KENDRICK DESHAW,** | ) | |
| | ) | **UNPUBLISHED OPINION** |
| **Appellant.** | ) | |
| | ) | |

Siddoway, J. — Bryan DeShaw challenges his conviction for possession of a controlled substance, which was based on evidence discovered and seized after he was stopped by a police officer following a near collision witnessed by the officer. Mr. DeShaw claims that the officer had followed him, suspecting him of possessing drugs or drug paraphernalia, and that the near collision became a pretext for stopping him, even though it was the other driver—not Mr. DeShaw—who was at fault.

The record of the suppression hearing reveals that the trial judge found the arresting officer credible and, giving deference to that credibility determination, includes

substantial evidence of a reasonable, nonpretextual traffic stop. We therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

In September 2008, Officer Todd Woodhouse was on routine patrol when he saw a near collision between Mr. DeShaw and another driver, both of whom were traveling southbound in front of him on Leslie Road in Richland, Washington. Officer Woodhouse stopped Mr. DeShaw and cited him for an unsafe lane change. While gathering identification from Mr. DeShaw, the officer saw a marijuana bong behind the front passenger seat and questioned Mr. DeShaw about it. Mr. DeShaw ultimately showed the officer a bag of marijuana and two bags of psilocybin mushrooms. The State charged Mr. DeShaw with possession of a controlled substance.

Mr. DeShaw moved to suppress the evidence. At the suppression hearing, he testified that on the afternoon in question he had stopped at Hippies Smoke Shop to purchase a glass pipe, and, after making the purchase and lingering to smoke a cigarette outside, noticed a city patrol car parked nearby. Mr. DeShaw testified that the patrol car followed him as he left the parking lot, turned onto Columbia Park Trail and headed west. Because he was nervous about being followed with drugs in his possession, Mr. DeShaw turned off Columbia Park Trail into a parking lot after passing Leslie Road, and waited for the patrol car to pass. After the patrol car passed, Mr. DeShaw pulled out of the parking lot and drove back toward Leslie Road. He testified that he then noticed in his

rearview mirror that the officer had made a U-turn after passing him on Columbia Park Trail and, upon seeing Mr. DeShaw pull back into traffic, began to follow him again.

Mr. DeShaw turned right onto Leslie Road and while driving in the right-hand lane toward a point where the two lanes of southbound traffic merge into one, Mr. DeShaw testified that a van driving in the left-hand lane, a bit behind him although almost parallel, started speeding up. Signage on the road indicates that drivers in the left lane are required to yield and merge. Mr. DeShaw testified that he did not slow down, but turned on his left turn signal and waved his hand as a warning to the van, whose driver then slammed on his brakes, allowing Mr. DeShaw to proceed safely into the single lane. Officer Woodhouse turned on his emergency lights and stopped Mr. DeShaw following this near collision. Based on this evidence, Mr. DeShaw's counsel argued that the officer lacked probable cause to stop Mr. DeShaw, who committed no infraction. Counsel argued further that the officer had shadowed Mr. DeShaw, and his election to stop an innocent driver demonstrated that his real interest was not traffic patrol, but to investigate whether Mr. DeShaw possessed drugs or paraphernalia.

Officer Woodhouse testified at the suppression hearing that his assignment on the afternoon in question was routine patrol, including traffic enforcement. He denied following Mr. DeShaw or waiting by the smoke shop for patrons to leave. He admitted that he could not be certain that he had not seen Mr. DeShaw and a companion leave the

smoke shop, but testified that he would ordinarily mention such an observation in his report, which was silent on that score in this case. After Mr. DeShaw testified to his version of the near collision, Officer Woodhouse testified in rebuttal that the near collision did not occur at the merge point on Leslie Road. Officer Woodhouse testified that Mr. DeShaw had signaled and attempted an unsafe lane change into the left-hand lane before reaching the stretch of road where the lanes merge, and it was for that reason that the officer stopped and cited him. He testified, specifically:

> Q Well, showing you what has been marked seems to be pretty much the same Ident. E, Ident. D, and Ident. F.[1] Ident. D there is a merge left sign. You see it there?
> A Yeah.
> Q Are you familiar with that area?
> A Yeah.
> Q Your recollection is that's where you saw the bad lane change where the near collision was?
> A As I recall it was before the lane merge. Otherwise it wouldn't have been relevant to me. It would have been the other vehicle in my opinion that would have been in violation.
> Q So your recollection was it isn't as the defendant characterized it as some other spot, right?
> A Right. I didn't note it in my narrative that it occurred at a merging area, which would have been something I would note because he signaled left into a lane that ends, if that's the case.

Report of Proceedings (June 4, 2009) (RP) at 26.

[1] Exhibits D, E, and F were photographs taken by Mr. DeShaw of the area on Leslie Road where vehicles must merge to the right, and of signage indicating the impending merge.

The incident report and summary of probable cause prepared by Officer Woodhouse the morning after the stop were consistent with his testimony, providing in part:

> In the City of Richland on 9-27-08 . . . [I] observed a blue Pontiac Grand Prix . . . change lanes to the left without allowing a safe distance for the vehicle already occupying the lane of travel. I observed the mini van that was already occupying the lane have to apply its breaks [sic] to keep from possibly colliding with the Grand Prix. I activated my overhead emergency lights and stopped the vehicle.
>
> I contacted the driver and informed him of the reason for the stop.

Clerk's Papers (CP) at 14, 17-18.

After hearing the evidence and argument on Mr. DeShaw's motion to suppress, the trial judge ruled:

> THE COURT: Officer's testimony was confirmed by the testimony of the defendant there was a near collision that occurred. So there was an almost accident that occurred. The officer indicated he saw that and stopped the car for that reason. There was probable cause to stop for that reason so I will deny the motion.
>
> MR. BIEKER [Deputy Prosecuting Attorney]: Thank you, Your Honor.
>
> MR. HARMS [Defense Counsel]: As a finding of fact who committed the infraction?
>
> THE COURT: I don't have to determine who committed an infraction. I have to determine that the officer saw a near collision and felt an infraction occurred and had a duty and right to stop the car.
>
> MR. ZIEGLER [Counsel for Co-Defendant[2]]: I guess we need some clarification on that, Judge. Mr. Bieker himself says he is fuzzy about what duties drivers have in that particular situation.

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[2] The co-defendant, a passenger in the vehicle, participated in the June 4, 2009 suppression hearing.

> THE COURT: I think most drivers are, too.
> MR. BIEKER: It's also the privilege of being mistaken so I don't think it much matters.

RP at 34-35.

Following denial of his motion to suppress, Mr. DeShaw agreed to a stipulated facts trial and was convicted of possession of a controlled substance. He appeals, arguing that the trial court concluded, in error, that the near collision alone was sufficient cause for the stop, and that the officer could choose which car to stop without regard to fault. He argues that the stop and search violated the constitutional requirement for probable cause and protection against pretextual stops.

ANALYSIS

When an evidentiary hearing is conducted on a motion to suppress evidence, the court is required by CrR 3.6(b) to enter written findings of fact and conclusions of law at the conclusion of the hearing. Mr. DeShaw points out that the trial court did not enter written findings or conclusions in this case, but has not assigned error to that failure. Br. of Appellant at 1, 4. The failure to enter findings and conclusions is error, but it is harmless if the trial court's oral findings are sufficient to permit appellate review. *State v. Smith*, 145 Wn. App. 268, 274, 187 P.3d 768 (2008). If the oral ruling does not provide a sufficient basis for appellate review, a trial court's failure to enter written findings and conclusions ordinarily requires remand for entry of findings and conclusions, not

reversal. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Defense counsel confirmed at oral argument that she is not asking that we remand this matter for entry of additional findings by the trial judge, but instead that we review the suppression decision on the basis of the record of the hearing. Counsel for both parties agreed at oral argument that the record is sufficient for review.

When reviewing denial of a CrR 3.6 motion to suppress, we look for substantial evidence in the record to support the trial court's findings of fact. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). We review the trial court's conclusions of law de novo. *Mendez*, 137 Wn.2d at 214. We may affirm a court's admission of evidence on any ground supported by the record, even if the trial court made an erroneous legal conclusion. *State v. Avery*, 103 Wn. App. 527, 537, 13 P.3d 226 (2000).

*Reasonable Suspicion for the Stop*

A traffic stop is a "seizure" for the purpose of constitutional analysis, no matter how brief. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). An ordinary traffic stop has been analogized to investigative detention subject to the criteria of reasonableness set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *Id.* A law enforcement officer is entitled to stop a vehicle without a warrant

when the officer has probable cause to believe that a traffic infraction has been committed in his presence. RCW 46.64.030; *Ladson*, 138 Wn.2d at 361. The probable cause required before an officer stops a vehicle to enforce the traffic code is a reasonable articulable suspicion that a traffic infraction has occurred. *Id.* at 349.

A *Terry* investigative stop only authorizes police officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on specific, objective facts, that the person detained is engaged in criminal activity or a traffic violation. *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007) (citing *State v. Duncan*, 146 Wn.2d 166, 172-74, 43 P.3d 513 (2002) for its citation of *Terry*, 392 U.S. 1). Merely being a witness to criminal activity or an infraction does not justify a stop unless the person is reasonably suspected to be involved in the wrongdoing. *See Smith v. Carney*, 142 Wn. App. 197, 203-04, 174 P.3d 142 (2007), *review denied*, 164 Wn.2d 1009 (2008).

The reasonableness of a traffic stop does not turn on whether a driver like Mr. DeShaw is proved to have committed an infraction, but instead on whether facts and circumstances warranted the stop; innocent or negligent mistakes of fact will not invalidate a stop. The federal guaranty under the Fourth Amendment, for example, does not proscribe "inaccurate" searches, only "unreasonable" ones. *See State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) (citing Kipperman, *Inaccurate Search Warrant*

*Affidavits as a Ground for Suppressing Evidence*, 84 Harv. L. Rev. 825, 832 (1971)). Mistakes of law are another matter. The sufficiency of reasonable suspicion must be determined by considering the conduct and circumstances relevant within the context of the actual meaning of the applicable substantive provision, not a mistaken one. *See* 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.3(a), at 361 & n.12, 363 n.23 (4th ed. 2004); *see also State v. Prado*, 145 Wn. App. 646, 647, 186 P.3d 1186 (2008). Accordingly, the facts as observed by the officer must give rise to reasonable suspicion that Mr. DeShaw actually violated the traffic code. *See State v. Nichols*, 161 Wn.2d 1, 13, 162 P.3d 1122 (2007).

Mr. DeShaw argues that the trial judge did not find that Officer Woodhouse saw him commit a traffic infraction, and therefore denied the motion to suppress based solely on the fact that the officer saw a near collision—an insufficient basis for stopping an innocent driver. Br. of Appellant at 7-9. He bases his argument on two comments made by the trial judge in denying the motion to suppress. Before addressing the two comments, we note that the trial judge only briefly explained his decision on the motion. Defense counsel confirmed during oral argument that she was not asking this court to remand so that the trial judge could clarify his decision with additional findings and conclusions; she candidly acknowledged her expectation that elucidation of the trial judge's oral ruling would be with a view to providing further or better justification for

denying the motion to suppress. We therefore will not remand, but will construe the record of the hearing in the light most favorable to the trial judge's decision and necessarily the State as the prevailing party. *See Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006).

Mr. DeShaw identifies as error the trial judge's initial statement of his ruling on the suppression motion:

> Officer's testimony was confirmed by the testimony of the defendant there was a near collision that occurred. So there was an almost accident that occurred. The officer indicated he saw that and stopped the car for that reason. There was probable cause to stop for that reason so I will deny the motion.

RP at 34. We agree that the mere fact that an innocent driver may have information about a near collision, without more, does not constitute the reasonable suspicion required for a *Terry* stop. If and to the extent that the foregoing statement reflects an erroneous legal conclusion, we disregard it, because other grounds for denying the suppression motion are supported by the record.

The trial judge explained his reasoning further, when asked by defense counsel about an infraction:

> MR. HARMS: As a finding of fact who committed the infraction?
> THE COURT: I don't have to determine who committed an infraction. *I have to determine that the officer saw a near collision and felt an infraction occurred* and had a duty and right to stop the car.

*Id.* (emphasis added). Mr. DeShaw concedes that as the fact finder, it is the trial judge who decides issues of fact and makes credibility determinations, and that we will not disturb a trial judge's credibility determinations on appeal. Br. of Appellant at 5 (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). But the significance Mr. DeShaw attaches to the foregoing exchange is that "the court refused to find Mr. DeShaw had committed a traffic infraction," which he equates to the trial judge's refusing even to find that Officer Woodhouse saw what he *reasonably believed* to be an infraction. Br. of Appellant at 5. He reads too much into the trial judge's statement. The issue to be decided at the CrR 3.6 hearing was not whether Mr. DeShaw was guilty of an unsafe lane change, but whether Officer Woodhouse reasonably suspected that Mr. DeShaw committed the infraction at the time he pulled Mr. DeShaw over. The trial judge addressed that issue, finding that Officer Woodhouse felt, from what he saw, that Mr. DeShaw had committed the infraction.

Finally, Mr. DeShaw argues that the evidence presented at the suppression hearing established that Officer Woodhouse could not reasonably have suspected Mr. DeShaw of committing an infraction. His argument proceeds from undisputed evidence that Mr. DeShaw was in the right-hand lane, and that at the merge point on Leslie Road the driver in the left-hand lane has the duty to yield. But it also proceeds from the disputed premise that the near collision occurred at the point at which the two lanes merge. Officer

Woodhouse did not agree that the near collision occurred at the merge point. He testified that the unsafe lane change was an attempt by Mr. DeShaw to move into the left-hand lane before the point where the lanes merge, and his incident report and probable cause statement were consistent with that testimony. The facts as observed by Officer Woodhouse—that before reaching the merge area Mr. DeShaw turned on his left turn signal and "change[d] lanes to the left without allowing a safe distance for the vehicle already occupying the lane of travel"—support a stop and citation for violating the traffic code. CP at 14, 18. Based upon the record that the parties have agreed is sufficient for our review, the trial judge did not err in finding that the officer had reasonable suspicion for the stop.

*Pretextual Stop*

Traffic stops or seizures that are a pretext, calculated to avoid the warrant requirement when the true reason for the seizure—criminal investigation—is not exempt from that requirement, violate article I, section 7 of the Washington Constitution. *Ladson*, 138 Wn.2d at 358. Pretext stops "generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations—violations for which the officer does not have probable cause." *State v. Myers*, 117 Wn. App. 93, 94-95, 69 P.3d 367 (2003), *review denied*, 150 Wn.2d 1027 (2004). To determine whether a stop is pretextual, the totality of the circumstances must be considered, including the

subjective intent of the officer and the objective reasonableness of the officer's behavior. *Ladson*, 138 Wn.2d at 358-59. To satisfy an exception to the warrant requirement, the State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code. *State v. Montes-Malindas*, 144 Wn. App. 254, 260, 182 P.3d 999 (2008) (citing *Ladson*, 138 Wn.2d at 359). If the court finds the stop is pretextual, all subsequently uncovered evidence must be suppressed. *Ladson*, 138 Wn.2d at 359.

Under the Washington Constitution, the fact that an officer had reasonable suspicion for a stop does not foreclose argument that the stop was pretextual, in violation of the defendant's right to be free of unreasonable searches. As summarized in *Ladson*, "The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception." 138 Wn.2d at 357.

At the suppression hearing, the State presented Officer Woodhouse's testimony that he was assigned to routine patrol, he had not been surveilling Hippies Smoke Shop in order to track potential drug users, he had not been shadowing Mr. DeShaw's car, the only reason he stopped Mr. DeShaw's car was because he observed what he believed to be an unsafe lane change resulting in a near accident, and he cited Mr. DeShaw for the

traffic infraction.

The trial judge had the opportunity to listen to and observe the demeanor of Officer Woodhouse and Mr. DeShaw, both of whom testified at some length about the circumstances leading up to the stop, and found that "there was an almost accident that occurred. The officer indicated he saw that and stopped the car for that reason." RP at 34. The trial judge commented that he was guided in denying the motion to suppress by his understanding that "I have to determine that the officer saw a near collision and felt an infraction occurred and had a duty and right to stop the car." *Id.* The testimony of Officer Woodhouse, if believed by the trial judge—which it was—provides substantial support for the State's position that this was a legitimate, nonpretextual traffic stop. We will not second-guess the trial judge's credibility determination.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, A.C.J.

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Sweeney, J.